United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7515

ORIGINAL

To be argued by
LEONARD KOERNER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

RAUL GONZALEZ,

Plaintiff-Appellee,

-against-

ALBERT SHANKER, ANNE MERSEREAU, LEONARD LURIE, ADOLPH ROHER, RICHARD LEE PRICE, JEROME GOODMAN, CAROLYN KOZLOWSKY, MARTIN RUBIN, KENNETH CAROSELLA, GARY SOUSA, HARRY LASSER, ROGER BRAVERMAN, LORRAINE SPIVACK, IRVING ANKER, JOSEPH MONSERRAT, STEPHEN AIELLO, JOSEPH G. BARKAN, ROBERT CHRISTEN, AMELIA ASHE, JAMES F. REGAN, ISAIAH ROBINSON, THE UNITED FEDERATION OF TEACHERS, SOL LEVINE, GEORGE FESKO and MAX GREEN,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Southern District of New York

MUNICIPAL APPELLANTS' BRIEF

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MUNICIPAL APPELLANTS' BRIEF

STATEMENT

Defendants' appeal in a civil rights action from an order of the United States District Court for the Southern District of New York (KNAPP, J.), entered on August 5, 1975, which denied a motion to dismiss.

The appeal is taken pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure. This Court granted the defendants permission to appeal on a certified question on September 2, 1975, and at the same time granted a stay pending determination

of that appeal.

QUESTION PRESENTED

Are the administrative remedies available to plaintiff adequate so that the plaintiffs' failure to exhaust such remedies requires dismissal of the complaint.

FACTS

COMPLAINT

Raul Gonzalez, of Puerto Rican descent, is the principal of Ottilia M. Beha Junior High School (60M) in District No. 1, located in the lower east side of Manhattan (4-5,11)*. Plaintiff had been employed in the position of acting principal since December 11, 1972 (5). Community School District No. 1 contains approximately 16 elementary schools with an enrollment of less than 13,000 students (11). The pupils who attend these schools are predominantly Puerto Rican (11).

The selection of members of the Community School Board during the past two years has been subject to heated political controversies (12). Prior to a School Board election on May 1, 1973, a majority of the members of the School Board belonged to a "Community" identified group (12). As a result of the May 1 election, the majority of the School Board were associated with the United Federation of Teachers

*Unless otherwise indicated, numbers in parentheses refer to pages in the Joint Appendix.

(U.F.T.) (12). The election was the subject of federal litigation. See Coalition for Education in District One, et al. v. The Board of Elections of The City of New York, 370 F. Supp. 42 (S.D.N.Y., 1974), affd. 495 F. 2d 1090 (2d Cir., 1974). In Coalition, the May 1 election was set aside. A new election was held on May 14, 1974 (13). The election resulted in the presently constituted School Board, which consists of a majority of five members who ran on a slate associated with the U.F.T. and four members who were associated with the "Community" slate (13).

The complaint alleges that the present School Board has "set upon a program of reversing all decisions and actions taken by the predecessor Board ***" (14). Consistent with this program, the Community School Board had suspended Luis Frentes, Superintendent of School District No. 1, and replaced him with the former Deputy District Superintendent, Anne Mersereau, a defendant in this action (14).

Prior to the Community School Board elections, the plaintiff was asked to meet with Sol Levine president of the U.F.T., Junior High School Division and other members of the union (14). At the meeting, the plaintiff was told of the U.F.T.'s interest in using his school as a model of "ghetto" school and in using the plaintiff as a model of U.F.T. excellence (15). Plaintiff told the union officials that he would not

cooperate with the U.F.T.'s request (15). Mr. Levine responded that such a position would make it difficult for the plaintiff to retain his position if the U.F.T. supported candidates were elected to the School Board (15).

The complaint alleges that because the plaintiff refused to cooperate with the U.F.T. representatives, the plaintiff has "been subjected to a deliberate and continuing program of harassment, interference and non-cooperation in the performance of his duties as principal of J.H.S. 60M" (15). The complaint lists fourteen separate incidents. Some of the specific incidents alleged were that: the Community School Board failed to act upon the disciplinary recommendations of the plaintiff; the School Board has withdrawn financial support for an existing after-hours Youth Service Agency Center at J.H.S. 60M; the plaintiff has been required to submit "lengthy, time-consuming, redundant and superfluous reports"; plaintiff has been effectively denied the assistance of the Office of Labor Relations; and defendant Chancellor Anker and members of the Board of Education have withheld a desperately needed painting of the entire school (16-19).

The only allegation directly attributable to the Chancellor and the Board of Educa-

tion involved the failure to paint J.H.S. 60M.

The complaint states that the actions of the defendants violated the plaintiff's constitutional rights under the First and Fourteenth amendments and violated his rights under 42 U.S. §§ 1981 and 1983, 1985(3) (22-23).

The complaint seeks injunctive and declaratory relief and damages (24-26).

MOTIONS TO DISMISS

On June 27, 1975, the municipal defendants and the other defendants each moved to dismiss the action on the grounds that the plaintiff had not exhaused his administrative remedies and had failed to state a cause of action (27,34).

Joseph F. Bruno, an Assistant Corporation Counsel, attached to his affidavit in support of the municipal defendants' motion to dismiss a copy of the collective bargaining agreement, entitled "Agreement between the Board of Education of the City of New York and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, October 1, 1972 - October 1, 1975" (CSA Contract) (44-121).

As a principal of J.H.S. 60M, the plain-

tiff is a supervisory employee and is covered by the terms of the CSA contract (). That contract provides specific administrative and contractual remedies for complaints or grievances which allege that: improper or unfair material has been placed in the supervisor's files (Article VI, subd. J and Article X); a supervisor was improperly dismissed or summoned for an interview which might lead to disciplinary action (Article VII, subd. J), and a supervisor in the course of his employment is the subject of harassing conduct or intimidation by a person or group of persons (Article XI) (79,83-87, 105-110,112-115).

The Article X procedure for resolving minor grievances provides the aggrieved supervisor (grievant) with a review of his problem by the Chancellor. Within ten school days after receipt of the grievance, the Chancellor is required to conduct a conference with the grievant, who can be represented by an official of CSA (107-108). If the grievant is not satisfied with the Chancellor's decision he can submit the grievance to an arbitrator who is selected by the American Arbitration Association from a panel of three arbitrators to be designated by mutual agreement of the parties (108-109). The arbitrator's recommendations are sub-

mitted to the Board of Education for a final determination (108-109).

The Special Complaints procedure under Article XI, which procedure is applicable where the aggrieved principal is alleging acts of harassment or intimidation, provides for initial review by the Chancellor (113). The Chancellor is required to establish a joint investigating committee consisting of one representative of CSA to review the complaint (113). If the joint investigating committee cannot resolve the problem to the satisfaction of the affected supervisor, the supervisor may request a hearing. Within fourty-eight hours after receipt of the request for the hearing, the Chancellor is required to hold a hearing during which the joint investigating committee's recommendations are reviewed and all persons involved are given an opportunity to be heard (113). The affected supervisor can be represented by an official of CSA other than an attorney (113).

Within seventy-two hours after the close of the hearing, the Chancellor is required to render a decision (114). If the affected supervisor is not satisfied with the decision, he may submit his complaint for a hearing and fact-finding before an arbitrator (fact-finder) (114). The arbitrator is required to render findings within seventy-two hours

after the close of hearing before him (14). Within ten days after the receipt of the fact-finder's report, the Board of Education is required to make a determination (14).

OPINION BELOW

In denying the motion to dismiss, the District Court found the administrative remedies provided in the CSA contract to be inadequate (149). The Court also found the review by the New York State Commissioner of Education to be inadequate under this Court's decision in Plano v. Baker, 504 F. 2d 598 (2d Cir., 1974) (146-147). The Court then stated (148-151):

> "It seems to be that Alexander [Alexander v. Gardner-Denver Co., 415 U.S. 36 (1971)] also precludes any requirement that purely contractual remedies be exhausted in civil right actions brought under sections other that Title VII, such as §1981, §1983, §1985 or §1986. Congress in enacting these civil provisons has 'long evinced a general intent to accord parallel or overlapping remedies against discrimination' (Alexander at 47).
>
> Defendants rely on the Second Circuit's decision in Fuentes v. Koher, [2d Cir., slip. opin. pp. 3807] supra, for the proposition that a plaintiff must exhaust contractual remedies. This reliance, however, is misplaced. While, as a technical matter, the remedies Fuentes was required to exhaust had been established by contract, the con-

tract in question specifically embodied the very due process provisons provided by the State Education Law. Thus, the Court of Appeals observed (slip. opin. at 3813):

> 'Fuentes was thus given by contract the procedural protections afforded tenured teachers and supervisors. These include rights to notice, retained counsel, the opportunity to call and to cross examine witnesses . . .'

The contract involved in the instant action, on the other hand, makes no reference whatever to the general due process provisions of the Education Law, and, as we have seen, specifically prohibits invocation of Section 2590j-7(f), the section which allows a trial examiner to administer oaths and subpoena witnesses and documents.

The woefully inadequate procedures available to plaintiff in this case demonstrate the wisdom of a rule not requiring the exhaustion of contractual remedies which are totally independent of any state administrative procedure.

As we noted above, the Article X grievance procedure is irrelevant, dealing, as it does, exclusively with the interpretation and application of the CSA contract. The procedures under Article XI in no way guarantee either accurate fact-finding or the satisfactory resolution of constitutional claims. The preliminary stages of this procedure contain significant infirmities. For example, when a complaint is first filed with the Chancellor - who, it should be reemphasized, is a defendant in this action - he appoints a joint investigating committee which consists of a representative designated by the

Chancellor and a representative not designated by the complainant, but rather by the CSA, the exclusive collective bargaining representative for supervisory employees. It is clear, however, that the interests of this organizations may be inimical to that of plaintiff's. Indeed, plaintiff contends that the CSA in the last School Board election in District No. 1 vigorously supported the slate of candidates put forward by the UFT and that the CSA in general has been anti-Puerto Rican.

At the hearing before the Chancellor, the next stage in the remedy procedure under Article XI, this 'joint' committee reports its findings and although the complainant does have an opportunity to be heard, he is expressly prohibited from having the assistance of an attorney.

Finally, if the joint committee and/or the Chancellor is unable to resolve the dispute, the matter then may be submtted to arbitration. We have already commented on the various restrictions that the contract imposes on the fact-finding process pursuant to this provision. We here note that these procedural defects are especially significant when one considers the scope and breadth of the constitutional issues, particularly in the First and Fourteenth Amendment areas, that must be resolved in this case. It is clear that such issues properly lie within the expertise of the courts, and not within the special competence of an arbitrator who is more concerned with the law of the shop than the law of the land. See Alexander v. Gardner-Denver Company, supra, 415 U.S. 36. Moreover, whatever guidance, if any, such an arbitrator could give the court on these constitutional issues, would be clearly limited by the inadequate fact-finding procedures available. See Plano v. Baker, supra, 504 F. 2d 599."

The Court also found that the complaint had stated a course of action against the municipal defendants and the U.F.T. defendants (151-152). It rejected the U.F.T's claim that its defendants were not persons under 42 U.S.C. §1983. The Court stated that private parties acting in conjunction with state officials can be liable under 42 U.S.C. §1983 (152-153).

APPLICABLE PROVISIONS
OF CSA CONTRACT

"ARTICLE VI

SPECIAL WORKING CONDITIONS

* * *

3. SUPERVISOR FILES

Official supervisor files in a school shall be maintained under the following circumstances:

1. No material derogatory to a supervisor's conduct, service, character or personality shall be placed in the files unless the supervisor has had an opportunity to read the material. The supervisor shall acknowledge that he has read such material by affixing his signature on the actual copy to be filed, with the understanding that such signature merely signifies that he has read the material to be filed and does not necessarily indicate agreement with its content. However, an incident which has not been reduced to writing within three months of its occurrence, exclusive

of the summer vacation peiod, may not later be added to the file.

2. The supervisor shall have the right to answer any material.

3. Upon appropriate request by the supervisor, he shall be permitted to examine his files.

4. The supervisor shall be permitted to reproduce any material in his files.

5. Material will be removed from the files when a supervisor's claim that it is inaccurate or unfair is sustained.

* * *

ARTICLE X

GRIEVANCE PROCEDURE

"It is the declared objective of the parties to encourage the prompt and informal resolution of employee complaints as they arise and to provide recourse to orderly procedures for the satisfactory adjustment of complaints.

A. DEFINITION

1. The term 'grievance' shall mean:

   a. A complaint by a supervisor covered by this Agreement that there has been as to him a violation, misinterpretation or inequitable application of any of the provisions of this Agreement or of the Memorandum of Understanding between the Board and CSA dated October 1, 1972.

   b. A complaint by CSA involving alleged misapplication or misinterpreation of this Agreement or of the Memorandum of Under-

standing between the Board and CSA dated October 1, 1972.

B. ADJUSTMENT OF GRIEVANCES

Grievances shall be presented and adjusted in the following manner:

FIRST LEVEL - ALL SUPERVISIOR

A supervisor shall within a reasonable time following the act or condition on which his complaint is based discuss the matter with his immediate supervisor in an effort to resolve the problem informally as promptly as possible. It is understood that, if the complaint is resolved informally, no record of the procedures at this level shall be made or kept without the written consent of the aggrieved supervisor.

SECOND LEVEL - SUPERVISORS OTHER THAN PRINCIPALS

If the complaint has not been resolved informally at the first level within 20 days of the initial informal discussion with his immediate supervisor, the grievant may file a written grievance with the appropriate Community or Assistant Superintendent, the Bureau Director or other appropriate Board official at the next higher level of supervision. Where the grievant is not represented by CSA, he shall file a copy of the grievance with CSA at the same time as he files his grievance at this level.

Within ten (10) school days following receipt of the grievance, a conference shall be called by the supervisor with whom the grievance is filed with a view to arriving at a mutually satisfactory resolution of the complaint. Such conference shall be called on not less than two (2) school days' written notice to the grievant, his immediate supervisor, and CSA. The grievant shall be entitled to representation at the conference by CSA or by a supervisor of his choice in the New York City school system. Where the grievant is not re-

presented by CSA, CSA shall be permitted to attend the conference and present its views.

If no mutually satisfactory resolution has been reached at the conference within five (5) school days following the conference, the supervisor with whom the grievance is filed shall communicate his written decision to the grievant and his representative, to his immediate supervisor, and to CSA.

THIRD LEVEL - SUPERVISORS OTHER THAN PRINCIPALS

If the grievance is not resolved at the Second Level, the grievant may, within fifteen (15) school days after receipt of the decision of the second-level supervisor, appeal in writing to the Chancellor. The appeal shall set forth the basis for the grievance and the reasons for the appeal.

Within fifteen (15) school days following receipt of the appeals, and on not less than two (2) days' written notice to all those who participated in the second-level conference, a conference shall be called by the Chancellor or his designee with a view to arriving at a mutually satisfactory resolution of the complaint. The grievant shall be entitled to representation by CSA or a supervisor of his choice in the New York City school system at the conference. Where the grievant is not represented by CSA, CSA shall be permitted to attend the conference and present its views.

Within twenty (20) school days following the conference, the Chancellor or his designee shall communicate his written decision to the grievant, the supervisors who attended the third step conference and to CSA.

SECOND LEVEL - PRINCIPALS

Where the grievant's immediate supervisor is a district or assistant superintendent, the written grievance shall be

filed directly with the Chancellor within 30 days of the initial informal discussion with the grievant's immediate supervisor. Within ten (10) school days following receipt of the grievance a conference shall be called by the Chancellor or his designee with a view to arriving at a mutually satisfactory resolution of the complaint. Such conference shall be called on not less than two (2) school days' written notice to the grievant, his immediate supervisor and CSA. The grievant shall be entitled to representation at the conference by CSA or by a supervisor of his choice in the New York City school system. Where the grievant is not represented by CSA, CSA shall be permitted to attend the conference and to present its views. If no mutually satisfactory resolution has been reached at this conference, within twenty (20) school days following the conference, the Chancellor shall communicate his written decision to the grievant and his representative, his immediate supervisor and to CSA.

GRIEVANCES INITIATED BY CSA

CSA may initiate a grievance as defined in paragraph A 1 b above at the level of a district superintendent, an assistant superintendent or the Chancellor as may be appropriate.

C. ARBITRATION

A grievance which has not been resolved at the level of the Chancellor may be submitted to an arbitrator.

A grievance may not be submitted to an arbitrator unless a decision has been rendered by the Chancellor under the grievance procedure, except in cases where, upon expiration of the twenty-day time limit for decision, the aggrieved supervisor or CSA filed notice with the Chancellor of intention to submit the grievance to arbitration and no decision was issued by the Chancellor within twenty school days after receipt of such notice. The supervisor may pro-

ceed personally or through CSA or any other representative of his choice. Where the supervisor is not represented by CSA, CSA shall be given timely notice of the submission to arbitration and CSA shall be permitted to submit its views to the arbitrator.

The proceeding may be initiated by filing with the Board and the American Arbitration Association a notice of arbitration. The notice shall be filed within ten school days after receipt of the decision of the Chancellor or, where no decision has been issued in the circumstance described above, within three days following the expiration of the twenty-day period provided above. The notice shall include a brief statement setting forth precisely the issue to be decided by the arbitrator and the specific provision of the agreement involved.

The American Arbitration Association shall appoint one of a panel of three arbitrators to be designated by mutual agreement of the parties, to serve in rotation for any case or cases submitted.

The voluntary labor arbitration rules of the American Arbitration Association shall apply to the proceeding insofar as they relate to the selection of the arbitrator, the hearings and fees and expenses.

The arbitrator shall issue his decision not later than 30 days from the date of the closing of the hearings or, if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator. The decision shall be in writing and shall set forth the arbitrator's opinion and conclusions on the issues submitted. The arbitrator shall limit his decision strictly to the application and interpretation of the provisons of this agreement and he shall be without power or authority to make any decision:

1. Contrary to, or inconsistent with, or modifying or varying in any way, the terms of this agreement or of applicable law or rules or regulations having the force and effect of law;

2. Involving Board discretion or Board policy under the provisons of this agreement, under Board by-laws, or under applicable law, except that he may decide in a particular case that Board policy was disregarded or that its attempted application under any term of this agreement was so discriminatory, arbitrary, or capricious as to constitute an abuse of discretion.

3. Limiting or interfering in any way with the powers, duties, and responsibilities of the Board under its by-laws, applicable law and rules and regulations having the force and effect of the law.

The decision of the arbitrator shall be in writing and, if made in accordance with his jurisdiction and authority under this agreement, shall be advisory only and not binding upon the Board.

The Board shall make a final determination within 30 days after receipt of the arbitrator's decision.

The arbitrator's fee will be shared equally by the parties to the dispute.

D. GENERAL PROVISIONS AS TO GRIEVANCES AND ARBITRATION

1. The filing or pendency of any grievance under the provisins of this Article shall in no way operate to impede, delay or interfere with the right of the Board to take the action complained of, subject, however, to the final decision on the grievance.

3. Nothing contained in this article or elsewhere in this agreement shall be considered to deny to any employee his rights under SEction 15 of the New York Civil Rights Law or under the State Education Law or under applicable Civil Service Laws and Regulations.

3. All grievance conference shall be held at convenient times and locations in order to afford a fair and reasonable opportunity for all those entitled to be present to attend. When such conferences are scheduled during Board working hours all persons participating shall be excused their regular duties without loss of pay.

E. TIME LIMITS

1. Failure at any level of this procedure to communicate the decision on a grievance within the specified time limits shall permit the aggrieved supervisor to proceed to the next level. Failure at any level of this procedure to appeal a grievance to the next level within the specified time limits shall be deemed acceptance of the decision rendered at that level.

2. The time limits specified in this procedure may be extended in any specific instance by mutual agreement.

F. PRIORITY HANDLING OF GRIEVANCES

The Board and the CSA will consult periodically on the priority of handling grievances pending at the level of the Chancellor with a view to expediting the processing of grievances which require prompt disposition.

ARTICLE XI

SPECIAL COMPLAINTS

It is the declared objective of the parties to encourage the prompt and informal resolution of special complaints not covered by the Grievance Procedure and to dispose of such complaints as they arise and to provide recourse to orderly procedures for their adjustment.

A. DEFINITION

A 'special complaint' is a complaint by a supervisor that a person or persons or groups are engaging in a course of harassing conduct, or in acts of intimidation, which are being directed against him in the course of his employment, and that the principal of the school in which he is assigned or the District Superintendent of the district in which he is employed or the appropriate Assistant Superintendent at the high school level has not afforded the supervisor adequate relief against such course of conduct or acts of intimidation.

B. FILING AND PRIORITY HANDLING

A special complaint shall be promptly filed with the Chancellor by the affected employee or, upon his request, by CSA. Such complaint shall receive expedited handling pursuant to this Article.

C. JOINT INVESTIGATION AND INFORMAL RESOLUTION

Within twenty-four (24) hours after the special complaint is filed with the Chancellor, a 'Joint' Investigating Committee consisting of one representation designated by the Chancellor and one representative designted by CSA shall investigate the complaint at the school or district levl to ascertain the facts and bring about a prompt resolution of the problem without resort to formal procedures. In the course of its investigation, the Joint Committee shall confer with the principal of the school, the Chancellor and other persons involved in the controversy.

D. ADMINISTRATIVE HEARING AND CONTINUED ATTEMPT AT INFORMAL RESOLUTION

If the complaint is not resolved by the Joint Investigating Committee to the satisfaction of the affected supervisor he may request a hearing before the Chancellor. Within forty-eight (48) hours after receipt of the request for hearing, the Chancellor, or a representative designated by him, shall hold a hearing at which the Joint Investigating Committee shall report its findings and all persons involved, including the affected supervisor, shall have an opportunity to be heard. The complaining supervisor may represent himself at the hearing or, upon request, may be represented by CSA or by a person of his own choosing other than an attorney.

At the hearing the Chancellor, or his representative shall make every effort to resolve the complaint informally and all persons involved shall cooperate toward this end.

E. DECISION OF THE CHANCELLOR

Within seventy-two (72) hours following the close of the hearing, the Chancellor shall notify all parties of his decision and the manner in which it shall be effectuated.

F. FACT FINDING AND RECOMMENDATIONS

If the complaint is not resolved by the Chancellor, the affected supervisor, or CSA upon his request, may submit it for hearing and fact finding before an arbitrator selected in accordance with Article X C of this Agreement. The submission shall be made within ten (10) school days after the issuance of the Chancellor's decision.

The voluntary labor rules of the American Arbitration Association shall apply to the proceeding in so far as they relate to the hearing, fees and expenses.

The fact-finder shall render findings not later than seventy-two (72) hours from the date of the close of the hearings or, if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the fact-finder. The findings of fact shall be in writing. The fact-finder shall limit his findings strictly to the question whether the employee's complaint has been substantiated by the evidence. If the fact-finder finds the complaint to be substantiated and unremedied, he shall recommend an appropriate remedy.

The fact-finder shall not interpret or apply the provisions of this Agreement or exercise any of the other functions specified in Article X of this agreement, nor shall he exercise any of the powers conferred upon trial examiners pursuant to Section 2590-j 7 (f) of the Education Law.

G. BOARD CONSIDERATION

Within ten (10) days after receipt of the fact finder's report, the Board shall make a determination."

ARGUMEMT

THE FAILURE OF THE PLAINTIFF TO AVAIL HIMSELF OF THE ADMINISTRATIVE AND CONTRACTUAL REMEDIES WITH RESPECT TO EACH OF HIS CLAIMS OF ADMINISTRATIVE HARASSMENT OR INTERFERENCE REQUIRES DISMISSAL OF THE COMPLAINT.

(1)

It is a well-established rule of law in this circuit that a plaintiff is not entitled to bring a civil rights action unless he has exhausted his administrative remedies. Fuentes v. Rcher, 519 F. 2d 379, 386 (2d Cir., 1975); Piano v. Baker 504 F. 2d 595, 597 (2d Cir., 1974); Blanton v State University of New York, 489 F. 2d 377, 383 (2d Cir., 1973); James v. Bd. of Educ., 461 F. 2d 566, 570 (2d Cir., 1972), cert. den. 409 U.S. 1042 (1972); Eisen v. Eastman, 421 F. 2d 560, 567-569 (2d Cir., 1969), cert. den. 400 U.S. 841 (1970). The rule is applicable whether the administrative remedies are provided by statute, administrative regulation or contract. Fuentes v. Roher, supra, 519 F. 2d 379 (2d Cir., 1975).

In Fuentes, the plaintiff, a community school superintendent, had been suspended with pay and charges were brought against him. Fuentes' contract specified that dismissal could only take place after a due process hearing. Fuentes, instead of participating in the due process hearing, brought

a civil rights action in the District Court. This Court affirmed the District Court's dismissal of the complaint on he ground that the plaintiff had not exhausted his administrative remedies.

The exhaustion rule does require that the administrative remedies be adequate and provide an expeditious procedure, and that resort to such remedies will probably not be futile. Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir., 1969), cert. den. 400 U.S. 841 (1970). In Eisen, this court noted that the doctrine would be applicable where "a complaint alleged that a subordinate state officer had violated the plaintiff's constitutional rights by acting because of bias or other inadmissable reasons, by distorting or ignoring the facts, or by failing to apply a constitutional state standard, and the state has provided for a speed appeal to a higher administrative officer * * *". 421 F. 2d at p. 569.

In Plano v. Baker, supra, 504 F. 2d 595 (2d Cir., 1974), this court held that the plaintiff was not required to exhaust an administrative remedy on the ground that the remedy was inadequate. The plaintiff, a probationary teacher, had been dismissed. He brought a §1983 action alleging that the dismissal was for activity protected by the First Amendment and in a manner that deprived him of his constitu-

tional rights. The defendants, school officials, asserted that plaintiff's failure to appeal the School Board's order dismissing him to the New York State Commissioner of Education barred him from bringing the civil rights action. This Court rejected the argument finding that the appeal to the Commissioner was inadequate. This Court noted that the case presented a dispute which was largely factual. 504 F. 2d at p. 598. The Court found that nowhere in the administrative process was there a procedure to resolve the factual issues (id). The School Board had not conducted a fact-finding hearing and appeals to the commissioner do not permit the taking of testimony, with oral argument being discretionary.

The Court also found that the issues raised by the case, particularly those in the First Amendment area, were within the expertise of the courts, not the administrators. 504 F. 2d at p. 599.

(2)

Applying the criteria set forth in the above cited cases, the administrative and contractual remedies available to plaintiff in the instant case are adequate and the plaintiff should be required to exhaust such remedies before bringing an actin in the federal court. In the instant case,

plaintiff Gonzalez, unlike the plaintiffs in Fuentes, and Plano, has not been dismissed or even suspended from his position. Indeed, if he had been dismissed, he would have available to him the same contractual remedy, a due process hearing, as was available to Fuentes.

The causes of action alleged in the complaint relate to the central allegation that the defendants, in retaliation for the refusal of the plaintiff to cooperate with the UFT in the Community School Board elections, have subjected the plaintiff to a "deliberate and continuing program of harassment, interference and non-cooperation in the performance of his duties as principal of J.H.S. 60M" (15). The complaint then set forth 14 acts of harassment (16-22).

Article XI of the CSA contract provides adequate and expeditious procedures to review each one of the plaintiff's claims. That section defines a special complaint as a "complaint by a supervisor that a person or groups are engaging in a course of harassing conduct, or in acts of intimidation which are being directed against him in the course of his employment * * *." (64). We have already set forth in detail the procedure, supra pp 19-21. The procedures in the contract provide for a joint investigating committee, a subsequent

review by the Chancellor, a fact-finding, by an impartial arbitrator (fact-finder) and an ultimate determination by the New York City Board of Education. The plaintiff is entitled to have the New York State Commissioner of Education review the action of the Board of Education. See Education Law §310. Each of the participants in the special complaint process is required to render a decision under very strict time deadlines. The participation in the process of the fact-finder, who is required to hold hearings and make findings, assures the plaintiff that, if he chooses to have the State Commissioner of Education review the determination of the Board of Education, the Commissioner will have an adequate record before him. The plaintiff's position in the instant case is therefore, distinguishable from the position of the plaintiff in Plano v. Baker, 504 F. 2d 595 (2d Cir., 1974), where the Commissioner had no record before him. The instant case is further distinguishable from Plano since here the plaintiff has not lost his position. The adequacy of the remedy, is, in part, determined by the nature of the wrong sought to be redressed. Finally, in Plano, the plaintiff raised First Amendment and due process claims which this court determined

should be resolved by a court not an administrator. The instant case involves primarily a factual dispute which is peculiarly within the administrator's expertise.

In addition to the special complaint procedure, the contract provides a grievance procedure which could also be used by the plaintiff to obtain a satisfactory adjustment on some of the claims alleged in the complaint. For example, the claim that the defendants are placing deleterious material in his file could be reviewed under the grievance procedure or the special complaint procedure.

The requirement of exhaustion of administrative remedies in the instant case will further the purposes of the rule. In the interest of judicial administration, it is preferable to allow the agency to resolve the problem. The administrative procedure may avoid lengthy and expensive litigation. The claims in the instant case involve primarily an intramural dispute between the principal and the members of the local school board. It is more appropriate to initially attempt to settle such a dispute at an administrative level.

(3)

In denying the motion to dismiss, Judge KNAPP cited the decision of the Supreme Court in

Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974) (148). Alexander did not involve the question of exhaustion of remedies. In Alexander, the petitioner had initially filed a grievance pursuant to the collective bargaining agreement claiming that his discharge resulted from racial discrimination. After his claim was rejected, the petitioner commenced an action under Title VII of the Civil Rights Act. The respondent argued that the petitioner's submission of his grievance to an arbitrator precluded a Title VII action. The Supreme Court held that the remedy under Title VII is independent of the petitioner's remedies under the collective bargaining agreement. There is nothing in the opinion which indicates that the petitioner was not required to exhaust his administrative and contractual remedies before bringing a civil rights action. In Fuentes v. Rohr, supra, 519 F. 2d 379 (2d Cir., 1975), this Court, in a case decided more than one year after Alexander, upheld the dismissal of the complaint on the ground that the plaintiff had not exhausted his contractual remedies.

In finding the procedure to be inadequate, Judge KNAPP noted that the grievant could be represented by a CSA representative but not by an attorney (150). As we stated above, the procedure was

adequate for the disputes sought to be resolved. In cases involving government action having a much greater affect on the individuals than in the instant case, the Supreme Court has held that the affected individual is not entitled to have an opportunity to secure counsel. See Goss v. Lopez, 95 S. Ct. 729, 740 (1975) (suspension of student from school); Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (no right to counsel in disciplinary process in prison). See also, Brown v. Board of Educ., 42 AD 2d 702 (2d Dept., 1973) (probationary teacher does not have right to counsel in hearing to decide whether to discontinue his employment). It should be noted that the petitioner is entitled to counsel if he chooses to have the State Commissioner of Education review the determination of the New York City Board of Education.

(4)

It is anticapted that appellee will argue that the exhaustion of administrative remedies is not required where the civil rights action seeks damages and such relief is not available in the administrative procedures. In Fuentes v. Roher, 519 F. 2d 379 (2d Cir., 1975), the plaintiff sought damages in the civil rights action. As noted above, this Court required plaintiff to pursue his contractual remedies.

See also, Plano v. Baker, 504 F. 2d 595, 599 (2d Cir., 1974).

It is further anticipated that appllee will argue that the administrative and contractual remedies would be futile because the Chancellor and the members of the Board of Education, who participate in the administrative process, are defendants in the civil rights action and might be impermissibly biased. There is no reason t assume that the Chancellor or the members of the Board of Education would be biased. The allegations in the complaint concerning the Chancellor and the members of the Board of Education are based on the fact that they have the ultimate authority and responsibility for the educational system in the city. The only specific allegation as to the municipal defendants is their failure to paint J.H.S. 60M (17). The decision to paint a school is made by officials in the Office of Buildings of the Board of Education.

The grievance procedure provides for the participation of an absolutely neutral individual. Before submitting the grievance to the Chancellor, the grievant is entitled to an impartial fact-finder who is required to make recommendations. In addition, the grievant, if he is unsuccessful before the Chancellor and the

Board of Education, can appeal to the Commissioner of Education, an undisputedly neutral administrator.

In Fuentes v. Roher, the plaintiff argued that the administrative procedure deprived him of due process because several of the Community School Board members were biased. 519 F. 2d at p. 388. This Court rejected the claim, finding that subsequent review of the Community School Board's decision by the Chancellor the Board of Education and the State Commissioner of Education provided adequate protection to the plaintiff. In so holding this Court rejected the contention of the plaintiff that these officials would be affected by the decision of the local board. 519 F. 2d at p. 390.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND THE COMPLAINT DISMISSED, WITH COSTS.

November 5, 1975.

Respectfully submitted,

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of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 30 day of Oct 19 75, he served the annexed Memorandum Appellant's Brief upon Dayton & Sherman Esq., the attorney for the Plaintiff-Appellant herein by depositing ~~a copy~~ 3 of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 50 Rockefeller Plaza in the Borough of Manh., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 30 day of Oct 19 75

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York No. 2-2782
Certificate Filed in New York County
Commission Expires March 1, 19 77

Carlos M Rodriguez

Sharon L. Feigenbaum

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 30 day of Oct 1975, he served the annexed Municipal Appellant Brief upon James R Sanders Esq., the attorney for the Defendant Appellant herein by depositing ~~a copy~~ 3 copies of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 260 Park Ave South in the Borough of ....., City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 30 day of Oct 1975

SHARON L. FEIGENBAUM
Commissioner of Deeds
City of New York - No. 4-4
Certificate Filed in New York County
Commission Expires March 1, 1977

Carlos M Rodriguez

Sharon L. Feigenbaum

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